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The Honorable Marsha J. Pechman  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, *et. al.*,

Plaintiffs,

v.

DONALD TRUMP, *et. al.*,

Defendants.

Case No: 2:17-cv-1297-MJP

STATE OF WASHINGTON'S  
STATEMENT IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION

15  
16 STATE OF WASHINGTON,  
17  
18 *Intervenor-Plaintiff*,  
19  
20 v.  
DONALD TRUMP, *et. al.*,  
*Intervenor-Defendants.*

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STATE OF WASHINGTON'S STATEMENT  
IN SUPPORT OF PLS.' MOT. FOR  
PRELIMINARY INJUNCTION

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<sup>21</sup> *How Many Adults Identify as Transgender in the United States?* 4 (2016), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> (last visited Oct. 20, 2017)..... 3  
<sup>22</sup>

## I. INTRODUCTION

2 Washingtonians who serve in the United States military and in the National Guard  
3 defend our national interests and protect us in times of emergencies and great need. In  
4 Washington, we particularly rely on the National Guard to provide lifesaving assistance during  
5 natural disasters and emergencies. The service members we rely upon are people who willingly  
6 put their lives, safety, and comfort on the line to serve their state and country, and include  
7 transgender individuals who serve openly or silently. Our country, our state, and the fundamental  
8 principles of equal treatment and due process are threatened and offended by the Defendants'  
9 targeting of transgender service and Guard members and transgender individuals who wish to  
10 serve in the military or Guard for disparate treatment based solely on their transgender status,  
11 gender identity, and sex – which has no bearing on an individual's fitness to serve in the military  
12 or the Guard.

13        The Defendants’ discriminatory Transgender Military Service Ban (“Ban”), by targeting  
14 transgender Washingtonians, creates very real, imminent harms to Washington’s sovereign,  
15 quasi-sovereign, and proprietary interests. To protect those interests, Washington joins the  
16 *Karnoski* Plaintiffs’ Motion for Preliminary Injunction as a movant.

## II. ARGUMENT

## A. Relevant Procedural History

19 On September 14, 2017, the *Karnoski* Plaintiffs filed a Motion for Preliminary Injunction  
20 requesting this Court bar “Defendants and those acting in concert with them or subject to their  
21 control from taking any action relative to transgender individuals, pending resolution of this case  
22 that is inconsistent with the *status quo* that existed on July 25, 2017.” Mot. for Prelim. Inj. at 24,  
23 ECF 32. On September 25, Washington moved to intervene to protect its sovereign, quasi-  
24 sovereign, and proprietary interests. Mot. to Intervene, ECF 55. Defendants oppose Plaintiffs’  
25 motion for preliminary relief, ECF 69, and the parties’ briefing completed on November 9, ECF

1 90. This Court heard oral argument on Washington's Motion to Intervene on November 14 and  
 2 allowed Washington to intervene as of right and by permission. *See* ECF 96.

3 Washington, as Plaintiff-Intervenor, joins the pending Motion for Preliminary Injunction  
 4 to ensure its interests are before the Court the motion is considered. To avoid any prejudice to  
 5 Defendants, Washington presents no new substantive arguments in this motion, and instead  
 6 Washington joins in full the arguments for preliminary injunctive relief advanced by the  
 7 *Karnoski* Plaintiffs. Washington briefs here only why it will suffer irreparable harm absent a  
 8 preliminary injunction.

9 **B. The State Will Suffer Irreparable Harm if This Court Does Not Issue a Preliminary  
 10 Injunction**

11 A plaintiff seeking a preliminary injunction must establish that they are: (1) likely to  
 12 succeed on the merits; (2) likely to suffer irreparable harm in the absence of preliminary relief;  
 13 (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public  
 14 interest. *Winter v. Nat'l Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). "When the  
 15 government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d  
 16 1073, 1092 (9th Cir. 2014). Where there is a likelihood of irreparable injury and the injunction  
 17 would serve the public interest, a preliminary injunction should issue when serious questions  
 18 going to the merits are raised and the balance of hardships tips sharply in the plaintiff's favor.  
 19 *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Further, for purposes  
 20 of preliminary injunction, a plaintiff "need not prove that irreparable harm is certain or even  
 21 nearly certain." *Small v. Avanti Health Sys., LLC*, 664 F.3d 1180, 1191 (9th Cir. 2011). That is  
 22 particularly true when the practice to be enjoined has employment-related consequences as  
 23 "permitting an alleged unfair labor practice to reach fruition ... is irreparable harm." *Id.* at 1191.

1       The Court granted Washington intervention so that it could protect its unique state  
 2 interests. The same State interests that the Court considered sufficient to warrant intervention  
 3 will be injured by the Ban if this Court does not issue a preliminary injunction.<sup>1</sup>

4       **1. Washington will suffer irreparable injury if its residents continue to be  
 5 subjected to the Ban**

6       Washington State is home to approximately 60,000 active, reserve, and National Guard  
 7 members, approximately 45,000 of whom are active duty service members. Decl. L. Baker Ex.  
 8 B, ECF 56-2. Each of these Washingtonians works for the military and is part of an entity that  
 9 is engaging in discrimination against a distinct and politically vulnerable population. As such,  
 10 each of these Washingtonians are impacted by the discriminatory Ban – regardless of whether  
 11 they are transgender – because their service is governed by a policy that targets their colleagues  
 12 and teaches them that the military is willing to discriminate against its own. Further, there are  
 13 approximately 32,850 transgender adults living in Washington, and each and every one is  
 14 currently subject to a facially discriminatory government policy that singles them out for  
 15 disfavored treatment.<sup>2</sup> The Washington National Guard has 8,000 members. Each of these Guard  
 16 members' service is impacted by the discriminatory policy just as Washington-based service  
 17 members are. Mot. to Intervene at 6-8, ECF 55; Decl. D. Postman at ¶¶ 8-16, ECF 57.

18       The Ban also bars access to transitional related surgical care for transgender military  
 19 service members who may need such medical treatment. As such, at a minimum, the Ban  
 20 compromises the bodily integrity and physical well-being of transgender service members who  
 21 have not already started medical treatment to transition. *See* Supplemental Jane Doe Decl. at ¶¶

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22       <sup>1</sup> Although the district court in the District of Columbia issued a preliminary injunction in *Doe v. Trump*,  
 23 No. 17-1597, 2017 WL 4873042, at \*1 (D.D.C. Oct. 30, 2017), that injunction cannot be relied upon to protect  
 24 Washington's interests. The *Doe* injunction could be narrowed, reversed, or vacated for circuit-specific reasons.  
 25 Further, Defendants have consistently attacked the standing of the *Doe* plaintiffs and their standing could be  
 26 undercut by specific factual developments. *See* Mot. to Dismiss at 20-23, *Doe*, No. 17-1597 (D.D.C. Aug. 9, 2017),  
 ECF 45 (arguing that the plaintiffs lack standing).

<sup>2</sup> *See* Andrew R. Flores et al., The Williams Institute, *How Many Adults Identify as Transgender in the United States?* 4 (2016), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> (last visited Oct. 20, 2017).

1 3-4, ECF 92. Also, because the military has changed its policy stance, transgender Washington  
 2 military service and Guard members, who may be not be serving openly, have a legitimate reason  
 3 to fear repercussions if the military learns of their transgender status.

4 A policy that restricts employment based on immutable characteristics like sex and  
 5 gender identity, restricts access to health care based on those characteristics, and causes the  
 6 harms discussed above violates constitutional due process and equal protections. Such a policy  
 7 also implicates the “the health and well-being—both physical and economic—of [Washington]  
 8 residents.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982).  
 9 Indeed, as we speak, the Ban’s discriminatory practices are causing “political, social, and moral  
 10 damage” that this Court should protect against by issuing a preliminary injunction. *Id.* Issuing  
 11 such an injunction is well within the authority of this Court. Indeed, courts have long found that  
 12 constitutional deprivation of rights, such as that suffered by Washingtonians under the Ban, is  
 13 sufficient injury to sustain a finding of irreparable harm and the issuance of a preliminary  
 14 injunction. *See Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (refusing to stay a  
 15 preliminary injunction of travel ban and reaffirming that a “deprivation of constitutional rights  
 16 unquestionably constitutes irreparable injury”); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th  
 17 Cir. 2012) (affirming that “[i]t is well established that the deprivation of constitutional rights  
 18 ‘unquestionably constitutes irreparable injury’”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373  
 19 (1976)).

20 **2. Washington will suffer irreparable harm to its proprietary interests if  
 21 Defendants are not enjoined from continuing the Ban**

22 Washington’s economic and proprietary interests are harmed absent a preliminary  
 23 injunction. Washington collects taxes from all workers in Washington State, and, the State’s tax  
 24 revenue will be impacted by the loss of any military and Guard service member or advancement  
 25 opportunities for Washingtonians who are transgender. Prop. Compl. at ¶ 8, ECF 55. Such losses  
 26 would also have ripple effects in Washington’s economy, impacting property and sales tax

1 revenues that would be contributed by transgender Washingtonian military service members and  
 2 their families.<sup>3</sup> These reductions in Washington's tax base will negatively impact Washington's  
 3 proprietary interest in its own economic health and growth.

4 Further, and critically, absent a preliminary injunction, Washington will be irreparably  
 5 harmed because it will be forced to continue to expend its scarce resources to support a  
 6 discriminatory policy when it provides funding or deploys its National Guard. Decl. of D.  
 7 Postman at ¶¶ 9-13. The State is likewise harmed by policies that hinder recruitment and  
 8 retention efforts. Prop. Compl. at 9; “[I]ntangible injuries, such as damage to ongoing  
 9 recruitment efforts and goodwill, qualify as irreparable harm.” *Rent-A-Center, Inc. v. Canyon*  
 10 *Tel. Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). These harms will continue as  
 11 long as the Ban is in place.

12       **3. Washington will suffer irreparable harm to its sovereign interests if  
 13 Defendants are not enjoined from continuing the Ban**

14 Washington's sovereign interests in protecting its territory and maintaining its anti-  
 15 discrimination laws will be harmed if Defendants are not enjoined from implementing the Ban.  
 16 In Washington, a critical part of the National Guard's mission is to prevent and minimize damage  
 17 caused by natural disasters like wildfires, landslides, flooding, and earthquakes. Decl. D.  
 18 Postman ¶¶ 6-11. Excluding transgender Washingtonians from the pool of candidates who can  
 19 join the National Guard diminishes numbers of service members who can provide emergency  
 20 response and disaster mitigation in emergent situations when Washington needs their assistance  
 21 most. Further, non-transgender individuals may likewise forego National Guard service in favor  
 22 of an inclusive and nondiscriminatory employer. Any reduction in qualified service members  
 23 negatively impacts the State's interest in responding to and mitigating harms to its territory.

24       In addition to protecting its natural resources, Washington has a sovereign interest in  
 25 maintaining and enforcing its longstanding anti-discrimination laws. *See* Wash. Rev. Code

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26       <sup>3</sup> See e.g. Decl. D. Postman ¶ 16 (describing transgender Guard member).

1    § 49.60.010 (legislative finding that discrimination “menaces the institutions and foundation of  
 2    a free democratic state”); Decl. D. Postman ¶ 4. “[T]he exercise of sovereign power . . . involves  
 3    the power to create and enforce a legal code; both civil and criminal[.]” *Snapp*, 458 U.S. at 601.  
 4    The Ban infringes on Washington’s sovereign interest by overriding its longstanding anti-  
 5    discrimination law, the Washington Law Against Discrimination. Wash. Rev. Code  
 6    §§ 49.60.010 – 49.60.505. The Ban injures Washington by permitting discrimination against  
 7    Washingtonians and even requiring the State to discriminate against its own people by barring  
 8    transgender people from joining the Washington National Guard. *Contra* Wash. Rev. Code  
 9    §§ 49.60.030; 49.60.040(26); 49.60.180 (guaranteeing a civil right to be free from sex or gender  
 10   identity discrimination, including in employment); Decl. D. Postman ¶ 4. Without a preliminary  
 11   injunction, the Ban will cause irreparable harm to the State’s unique interest in protecting its  
 12   natural resources and in enforcing its civil rights protections.

### 13                    III. CONCLUSION

14                    Washington will suffer irreparable harm if the Ban, or any part of it, continues to be  
 15   implemented. Washington joins the *Karnoski* Plaintiffs’ request for a preliminary injunction and  
 16   requests that the Court consider the nature and scope of the harms to Washington’s unique state  
 17   interests in considering whether to grant preliminary relief. These harms, when added to the  
 18   factual and legal showings made by the *Karnoski* Plaintiffs, merit preliminary injunctive relief.

19                    Respectfully submitted November 17, 2017.

20                    ROBERT W. FERGUSON  
 21                    Washington Attorney General

22                    /s/ La Rond Baker  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on November 17, 2017, I electronically filed State of Washington's Statement in Support of Plaintiffs' Motion for Preliminary Injunction with the Clerk of the Court using the CM/ECF system which will send notification of such filings to all counsel in this matter.

Dated this 17th day of November, 2017, at Seattle, Washington.

/s/ La Rond Baker  
LA ROND BAKER, WSBA #43610